Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-543

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405 2

Blake v. *City of Los Angeles*, 595 F. 2d 1367, cert. denied, 446 U.S. 928 1

Connecticut v. *Teal*, No. 80-2147 (June 21, 1982) 2, 4

Dothard v. *Rawlinson*, 433 U.S. 321 ..... 2, 3

EEOC v. *Radiator Specialty Co.*, 610 F. 2d 178 3

Griggs v. *Duke Power Co.*, 401 U.S. 424 2

Hazelwood School District v. *United States*, 433 U.S. 299 3

Horace v. *City of Pontiac*, 624 F. 2d 765 1

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 3, 4

LeBoeuf v. *Ramsey*, 503 F. Supp. 747 1-2

Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 4

United States v. *City of Buffalo*, 457 F. Supp. 612, modified and aff'd, 633 F. 2d 643 2

United States v. *Commonwealth of Virginia*, 620 F. 2d 1018, cert. denied, 449 U.S. 1021 ..... 1, 3

Vanguard Justice Society, Inc. v. *Hughes*, 471 F. Supp. 670 2

Page

Statute:

Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. IV) 2000e *et seq.* 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-543

STATE OF NORTH CAROLINA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, the State of North Carolina and certain of its officials, seek review of the invalidation of a minimum height requirement for state troopers employed by the North Carolina Highway Patrol (NCHP) on the ground that it violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. IV) 2000e *et seq.*, by discriminating against women. This case presents no novel issue of law or fact, but rather is one of many throughout the country in which lower courts, applying the standards articulated by this Court in Title VII disparate impact cases, have invalidated similar requirements of other state and local agencies.[1] Accordingly, this Court's review is not warranted.

---

[1]See, e.g., *Horace* v. *City of Pontiac*, 624 F. 2d 765 (6th Cir. 1980); *United States* v. *Commonwealth of Virginia*, 620 F. 2d 1018 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); *Blake* v. *City of Los Angeles*, 595 F. 2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); *LeBoeuf* v.

1. The district court (Pet. App. A-2 to A-8) properly applied this Court's standards in determining that the NCHP's 5'6" minimum height requirement has a substantial adverse impact on women (*id.* at A-3); that petitioners failed to demonstrate any relationship between the challenged height requirement and job performance as a state trooper with the NCHP (*id.* at A-4 to A-6); and that the height requirement therefore discriminates against women in violation of Title VII (*id.* at A-7). See *Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982), slip op. 5-6; *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971). The court of appeals, in an unpublished per curiam opinion (Pet. App. A-11 to A-12), affirmed the judgment of the district court "upon the record in this case" (*id.* at A-12), noting that petitioners failed to "demonstrate the need for * * * the physical requirement" (*ibid.*). The court cautioned, however, that its opinion did not preclude reimposition of a minimum height requirement for state troopers if in the future petitioners are able to establish "a factual underpinning" for such a requirement (*ibid.*).

2. Petitioners challenge the United States' use of general population statistics in establishing the adverse impact on women of the NCHP's height requirement (Pet. 5-10) and the burden of proof assigned to them on their defense of job-relatedness (*id.* at 11-13). Neither challenge has merit.

a. This Court has upheld the use of general population statistics in establishing a prima facie case of disparate

---

Ramsey, 503 F. Supp. 747 (D. Mass. 1980); *Vanguard Justice Society, Inc.* v. *Hughes*, 471 F. Supp. 670 (D. Md. 1979); *United States* v. *City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978), modified and aff'd, 633 F. 2d 643 (2d Cir. 1980).

impact attributable to the use of a minimum height requirement where, as here, the evidence "on its face conspicuously demonstrates [the] * * * requirement's grossly discriminatory impact."[2] *Dothard* v. *Rawlinson, supra*, 433 U.S. at 331. Similarly, this Court has upheld the use of general population statistics when the job skills required are skills "that many persons possess or can fairly readily acquire." *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n.13 (1977). In accordance with its prior decisions in *United States* v. *Commonwealth of Virginia*, 620 F. 2d 1018, 1025 (4th Cir.), cert. denied, 449 U.S. 1021 (1980), and *EEOC* v. *Radiator Specialty Co.*, 610 F. 2d 178, 185 (4th Cir. 1979), the court of appeals in this case affirmed the district court's reliance on the United States' general population statistics (Pet. App. A-3, A-12) in the absence of any showing by petitioners that the "dozens or hundreds of different tasks" performed by state troopers require any special skills not generally possessed or readily acquired (*id.* at A-12). Petitioners have never identified any such skills and do not now direct this Court's attention to any special qualifications required for the position of state trooper. Accordingly, the lower courts' reliance on general population statistics rather than on specially qualified work force statistics was entirely proper.[3]

---

[2]A 5'6" minimum height requirement eliminates 77.3% of women between the ages of 18 and 34, as opposed to 9.4% of men in that age group (Pet. App. A-3).

[3]The district court's rejection of petitioners' applicant flow data as not indicative of the level of interest among women in law enforcement positions (Pet. App. A-3) was also consistent with this Court's prior decisions. See *Dothard* v. *Rawlinson, supra*, 433 U.S. at 330-331; *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 365-367 (1977). In any event, the data rejected by the district court do not advance petitioners' case. To give but one example, the district court noted that petitioners offered a study purporting to show that women have only one-tenth the propensity to apply for law enforcement positions as men (Pet. App. A-3). Assuming, arguendo, that

b. Petitioners also assert (Pet. 11-12) that a conflict among the circuits has arisen since this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254-255 (1981), a disparate treatment case, as to the burden borne by the defendant in rebutting a prima facie disparate impact case. It is doubtful, however, that such a conflict can survive this Court's decision in *Connecticut* v. *Teal, supra*, slip op. 5-6, in which the Court expressly reaffirmed its pre-*Burdine* analysis of disparate impact cases. In our view, the clear import of the Court's disparate impact cases, both before and after *Burdine*, necessarily requires that a defendant do more than "articulate" (Pet. 6, 12) a defense of job-relatedness.

In any event, even application of the standard petitioners propose would not change the result here, because the district court found that the evidence showed "no factual foundation" for petitioners' assertion that the NCHP's minimum height requirement is job-related (Pet. App. A-6). The court of appeals agreed, noting that the height requirement lacks a "factual underpinning" (*id.* at A-12).[4] These evidentiary evaluations raise no issue worthy of review by this Court.

---

petitioners' study was valid, petitioners are still left with the facts that only 0.5% of the persons hired as NCHP troopers between 1972 and 1980 were female (Pet. 6), and that as of December 15, 1980, only one out of 1,131 NCHP troopers was a woman (Pet. App. A-3). Petitioners' hiring record is thus sufficiently close to "the inexorable zero," *International Brotherhood of Teamsters, supra*, 431 U.S. at 342 n.23, as to negate any attack on the United States' use of more generalized population statistics.

[4]The district court, in rejecting petitioners' theory of job-relatedness as without factual foundation, indicated that it appeared to be "an afterthought, developed * * * in an attempt to provide some empirical evidence of job relatedness" (Pet. App. A-5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1982

DOJ-1982-11